85-944

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Appellant,

v.

BURLINGTON INDUSTRIES, INC., *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTIONAL STATEMENT

APPENDIX

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TABLE OF CONTENTS

APPENDICES

Page

A. OPINION OF THE COURT OF APPEALS A-1

B. MEMORANDUM OPINION OF THE DISTRICT COURT A-22

C. JUDGMENT OF THE DISTRICT COURT A-32

D. NOTICE OF APPEAL A-33

E. TEXT OF RELEVANT STATUTES AND REGULATIONS A-35

APPENDIX A

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 84-2241(L)

Rose M. Holland; Jean H. Stallings; Walter Burlington, Jr.; John C. Brooks, Commissioner of Labor of the State of North Carolina,
Plaintiffs,

AND

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonne B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore; Frances Simmons; Jean H. Stallings; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B.

Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Walter Burlington, Jr.; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman; Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurman A. Chriscoe; Roy F. Williamson; Betty Albright; Nadine Albright; Boyce J. Asbill; Doris S. Baughan; Larry C. Beane; Melodye Snow Beard; Susan Beasley; Robert N. Blevins; Karen L. Boling; Wanda Bowman; Linda B. Brady; Linda P. Bristow; David Brittain; Marcella Jo Brittain; Mary R. Bullard; Betty S. Byrd; Charles H. Byrd; George M. Byrum; Charles F. Cagle, Jr.; Claude R. Cagle; Ann J. Campbell; Joe J. Cassett; Kimberly Spoon Coats; Garland J. Cole; George C. Cole; Ted Cooley; Clara M. Cox; Phyllis Ingold Cox; Cindy M. Cranford; Tommy L. Cranford; Curtis L. Craven; Jackie Nall Davis; Wayne L. Duggins; Nancy M. Ellison; Herman A. Flynt; Cecil C. Gatlin; Earl Glover; Willard E. Gordon; Rayford B. Grant; James L. Hammer; Donald L. Harshaw; Larry Lee Highsmith; Tommy W. Hill; Kathryn Jeanette Hogan; Carroll D. Hoyle; Sandra Hunsucker; Katherine R. James; Linda Jordan Kennedy; Coy A. Kiser; Marilyn Hewitt Knight; Robert N. W. Knott; Gaynell H. Ledwall; Marguerite M. Lineberry; Shelby L. Logsdon; Marlene B. Lucas; Barbara S. Miller; Juanita K. Moody; Grace H. McNeill; Robert F. McWilliams; Susan B. Pack; Cathy D. Powers; Betty M. Reeves; Van E. Rich; Edwin L. Ridge; Harry Rose; Carol L. Savchak; Lenora C. Shaw;

James W. Slaughter; Bobby N. Smith; Mike S. Smith; Imogene N. Snider; John W. Snider; Mary Edith Spoon; Jean A. Stafford; Mozelle A. Stout; Harriett W. Summey; Brenda S. Thomas; Gerald D. Thomas; Frances Freeman Tilley; Hazel S. Trogdon; Betty C. Von Cannon; Myrle L. Walker; William Bullock; Eurika Plummer; Terriel E. Wessinger, Jr.; Walter G. Williamson; James L. Wilson, Jr.; Mildred C. York; Faye T. Yow; Brian Dale Manuel; Raymond Claude Evans; A. Gene Heidel; Brenda B. Herndon; Russell W. Herndon; Virginia H. Schulte; Sandra G. Walker; Sharon G. Warren; Shirley W. Welch; and **Roger Downs,**

Appellants,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and **Humberto L. Quintana,**
Appellees.

State of New York,
Amicus Curiae.

No. 84-2257

Bill N. Slack; Jimmy W. Aheron; Carol Aldridge; Pamela B. Apple; Carole Gaggett; Thomas F. Bowden; Walter Brom; Nellie B. Burwell; Elizabeth S. Canada; Gary L. Carter; Irene Chandler; James J. Clifford; Linda S. Coble; James A. Crawford; Ruth Dixon; Octavia M. Driver; Edmund Foster; Richard C. Foy; Peggy A. Gerringer; Deville Goodman; Ada R. Griffin; Delanor M. Hamby; Mildred R. Hester; Evelyn H. Hilton; Peggy W. Hodge; Rose M. Holland; Mary E. Hope; Joseph J. Houston; Don Huffman; Jeff Hughes; Yvonne B. James; Melvin E. King; Norma M. Loy; Sara Copeland Maness; Linda Mooneyham; Cora N. Moore; Virginia M. Moore; Robert C. Moricle; Edna M. Murray; Faye F. Neese; Gladys J. Oakley; Patricia G. Page; Daniel E. Perry; Barbara E. Petty; P. Douglas Pierce; Betty Hornaday Ray; Ruth S. Rich; Mary Darlene Rierson; Fred Brewer Roberts; Ida B. Saul; William A. Seelman; Sylvia R. Shoe; Gladys H. Shore; Frances Simmons; Jean H. Stallings; Mary Foust Stansell; Peggy P. Stone; Sherman C. Summers; Frances B. Sykes; Barbara D. Thompson; Ronald F. Tyree; Hazel P. Walker; Mary Lou Whitfield; Rita P. Whitley; Sandra F. Wilson; Brownie A. Wright; Elsie B. Young; Bettie J. Boswell; Debbie M. Rascoe; Lemmer Sherdina Sellars; Jack T. Sullivan; Claude O. Anders; Eva Barr; Margaret Brindle; Walter Burlington, Jr.; Hoyt Cheek, Sr.; Hubert Foltz; Clyde Jarrell; Robert Martin; Thelma Martin; Leslie Morehead; Gerald Moretz; Alice Nelson; Carolyn Rayfield; Daisy Rickey; Ethel Royal; Larry Wright; William K. Anders; Merilla L. Barrier; Diane L. Boehm; Henry M. Brown; Hilda K. Cox; Stephen E. Elmore, Jr.; Richard L. Hall; William Jones; Paul M. King; Robert E. May; William Robert Oman; Cecil A. Poff; John W. Quick; Clifton Smith; Mary Smith; J. Clay Stiles, III; Bobby S. Tew; Thurman A.

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Plaintiffs,

AND

John C. Brooks, Commissioner of Labor of the State of North Carolina,
Appellant,

v.

Burlington Industries, Inc.; Calvin A. Michaels; Charles A. McLendon; and **Humberto L. Quintana,**
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO. RICHARD C. ERWIN, District Judge. (C/A 83-274-G).

Argued: May 7, 1985 Decided: September 3, 1985

Before **HALL** and **WILKINSON**, Circuit Judges, and **BUTZNER**, Senior Circuit Judge.

Marion G. Follin, III; Tiare B. Smiley, Assistant Attorney General (Michael K. Curtis; Smith, Patterson, Follin, Curtis, James & Harkavy; Lacy H. Thornburg, Attorney General; John C. Brooks, Commissioner of Labor; Thomas A. Harris, Director, Wage and Hour Division, on brief) for *Appellants/Intervenor*; McNeill Smith (Ben F. Tennille; Smith, Moore, Smith, Schell & Hunter on brief) for *Appellee*; (Robert Hermann, Solicitor General; O. Peter Sherwood, Deputy Solicitor General; Carlin Meyer, Assistant Attorney General; Jane Lauer Barker, Assistant Attorney General; Andrew Schultz, Assistant Attorney General; Robert Abrams, Attorney General, on brief) for *Amicus Curiae.*

WILKINSON, Circuit Judge:

Former employees of Burlington Industries, Inc. Socks and Hosiery Divisions brought suit seeking to recover severance pay allegedly due upon Bulington's sale of the divisions to Kayser-Roth Corporation. The court below granted summary judgment for defendant after finding that the severance pay policy at issue was subject to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, that ERISA preempted state law, and that Burlington's decision to deny severance pay was neither arbitrary or capricious. Finding no error in these holdings, we affirm.

I.

The 200 appellants were employees of Burlington's Socks and Hosiery Divisions on January 3, 1982, when Burlington sold the divisions to Kayser-Roth as going concerns. Pursuant to agreement with Burlington, Kayser-Roth offered employment to virtually all employees of these divisions, including appellants, who continued to work without interruption. The five employees not offered employment with Kayser-Roth received severance pay under the plan described below, and Burlington agreed to provide severance pay to any employee terminated by Kayser-Roth within six months of the transfer of ownership.

Burlington has maintained a severance pay plan for salaried employees since at least 1953. At the relevant time, the terms of the plan appeared in the company's Policy Manual, available to employees on request, and in the Salaried Employees' Handbook. The Handbook described the plan in general terms, providing that two weeks' to twelve months' severance pay would be available to "full time employees who involuntarily leave the

company."[1] The Policy Manual discussed the plan in more detail. In addition to setting out payment schedules for severance pay based on an employee's age and length of service, the Manual established eligibility requirements for severance pay. The most relevant requirement was that of "job termination," said to include "terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes."[2]

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[1]The complete text of the Handbook provision stated:

SEVERANCE PAY.

The Company provides severance pay to full-time employees who involuntarily leave the Company. Pay ranges from two weeks to twelve months, based on the employee's age and length of continuous service with the Company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits.

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[2]Relevant portions of the Manual provided:

I. *Company Policy*

A. *General*—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. *Payments*—Payroll severance payments are based upon tables contained in this policy . . . .

II. *Application of Policy*

A. *Payroll Severance*—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance.

1. *Eligibility*—Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:

a. *Job Elimination*—This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Appellants sought severance pay under this plan when Burlington sold the divisions to Kayser-Roth, asserting that they were entitled to the pay because their jobs with Burlington were terminated, and that their immediate re-employment by Kayser-Roth was irrelevant under the plan. Burlington denied that it owed severance pay, contending that there had been no "job elimination" as required by the Policy Manual.

Appellants initially sought redress in North Carolina state court, relying on common law claims of breach of contract and estoppel and several state statutes, including the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.7. The action was removed to federal court on Burlington's petition that the claims arose under ERISA. The plaintiffs amended their complaint to assert further claims based on ERISA. The Commissioner of Labor of the State of North Carolina ("Commissioner") intervened.

On appeal, the Commissioner primarily argues that the severance pay plan is not covered by ERISA, and that ERISA does not preempt state law. On this score, he is joined by officials from ten states and the District of Columbia as *amici curiae*. The 200 individual appellants contend that the denial of severance pay violated ERISA.[3]

II.

The Commissioner, joined by *amici*, asserts that ERISA simply does not apply to Burlington's severance pay policy, and that such a plan is therefore governed solely by state law. We reject this contention, and hold that Burlington's severance pay plan falls within the provisions

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[3]An action arising out of these same facts was filed in the Southern District of New York. The Second Circuit recently affirmed the district court's findings that the plan was within ERISA and that state law was preempted. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). The case was remanded for consideration of whether the denial of severance pay was arbitrary and capricious.

of ERISA as an "employee welfare benefit plan." Moreover, ERISA governs employer severance pay plans whether funded from general assets, as here, or from a special trust.

Congress enacted this complex legislation to federalize much of employee pension and benefit law. It characterized plans covered by ERISA as either "employee pension benefit plans," 29 U.S.C. § 1002(2) or "employee welfare benefit plans," 29 U.S.C. § 1002(1), both of which must comply with ERISA's reporting and disclosure requirements, 29 U.S.C. §§ 1021–1031, and its fiduciary standards for management of plan assets, 29 U.S.C. §§ 1101–1114. The former are subject to more stringent requirements than the latter, including the statute's vesting and funding requirements, 29 U.S.C. §§ 1053, 1082. None of the parties contends that the severance pay provision qualifies as an employee pension benefit plan. Rather, the issue is whether it constitutes an employee welfare benefit plan or a mere "payroll practice"—as defined by Department of Labor regulations, 29 C.F.R. § 2510.3-1—that falls outside the scope of ERISA.

The statutory language supports the designation of severance pay as an employee welfare benefit plan. Such plans, as defined in § 3(1) of ERISA, 29 U.S.C. § 1002(1), include:

> [A]ny plan, fund or program . . . maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) . . . benefits in the event of . . . unemployment . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Subsection (A) above refers to "benefits in the event of . . . unemployment." The evidence in this case suggests that at least one purpose of the Burlington plan is to provide help for employees during periods of unemployment that follow

the elimination of their jobs. This view of severance pay brings it within the definition of employee welfare benefit plan in § 1002(1)(A) and thus within the ambit of ERISA. *See Gilbert*, 765 F.2d at 325; *Jung v. FMC Corp.*, 755 F.2d 708, 710 n.2 (9th Cir. 1985); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1361 (D. N.J. 1982) ("Severance pay, which in general is intended to tide an employee over while seeking a new job, certainly could be considered an 'unemployment' benefit.")

Severance pay plans are also within the definition of 29 U.S.C. § 1002(1)(B), which refers to 29 U.S.C. § 186(c) for illustration of the types of benefits characterized as employee welfare benefit plans. Section 186(c)(6) describes "pooled vacation, holiday, *severance* or similar benefits" (emphasis added), and thereby brings such benefits within the meaning of employee welfare benefit plans. Other courts considering the issue have reached the same conclusion. *See e.g., Gilbert*, 765 F.2d at 325-26; *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357, 1361-62 (D. N.J. 1982); Dependahl v. Falstaff Brewing Corp., 491 F. Supp. 1188, 1196 (E.D. Mo. 1980), aff'd, 653 F.2d 1208 (8th Cir.); *cert. denied*, 454 U.S. 968, *sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981); *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980).

Department of Labor regulations promulgated under ERISA reinforce the conclusion that the effect of the reference to § 186(c) "is to include within the definition of 'welfare plan' those plans which provide holiday and *severance benefits* and benefits which are similar." 29 C.F.R. § 2510.3-1(a)(3) (emphasis added). The Commissioner's contention that the Secretary of Labor lacks authority to interpret the statute in this manner has been definitively answered by Congress through subsequent amendment to the statute. In 1980, Congress added the language found at 29 U.S.C. § 1002(2)(B): "The Secretary may by regula-

tion prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which — (1) severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." This amendment, adopted after the Secretary of Labor had promulgated the regulations, effectively sanctioned these regulations by statute and provided that severance pay arrangements, whether treated as pension plans or welfare plans, would be subject to the Act.

We also reject the Commissioner's contention that Burlington's severance pay plan is not within ERISA because it is not specially funded. He argues that § 186(c)(6) includes only funded plans because that section concerns money paid to a "trust fund" established for the purpose of "*pooled* vacation, holiday, severance or similar benefits." 29 U.S.C. § 186(c) (emphasis added). The Department of Labor regulations interpreting the reference to § 186(c), however, contain no limitation on the form of severance pay plans; the reference is to types of benefits that are to be covered by ERISA, whether in the form of trust funds or not. *Scott,* 754 F.2d at 1502. This is a reasonable interpretation of the statute, and one in which Congress has concurred by its 1980 amendments. The Second Circuit has also concluded that the interpretation reflected in the regulation is supported by the legislative history of the original enactment of ERISA. *See Gilbert,* 765 F.2d at 326.

The Commissioner further argues that the severance pay plan in this case is a "payroll practice" and not an employee welfare benefit plan according to the Department of Labor's own regulations. 29 C.F.R. § 2510.3-1(b) defines payroll practice to include payments out of an employer's general assets of compensation on account of work performed (including overtime pay, shift, premiums, holiday premiums, and weekend premiums), *id.* § 2510.3-1(b)(1), or for periods of absence due to medical

or psychiatric reasons, *id.* § 2510.3-1(b)(2), vacation, holiday, military duty, jury duty, training, or sabbatical leave. *id.* § 2510.3-1(b)(3). Here the Commissioner's argument is refuted by omission. The regulations simply do not include severance pay as a payroll practice and, in light of the authority described above, we see no reason to disturb the Secretary's categorization of severance pay as an employee welfare benefit plan. Payroll practices refer to general asset compensation during employment; severance pay, by contrast, occurs after termination of employment. *Scott*, 754 F.2d at 1503. The *Scott* court reasoned soundly that the greater "danger of default" on large and unanticipated severance obligations argued also for coverage under ERISA.

Though a major purpose of ERISA was to aid employees' knowledge and receipt of benefits, employees may, as here, urge that a paticular policy is *not* within ERISA so that claims may be heard before state courts or questions of federal preemption of state statutes may be avoided. These desires, however understandable, do not give us license to avoid the scheme established by Congress. As detailed above, Congress determined as a matter of policy that severance pay benefits should be subject to ERISA. It mandated that severance pay plans be subject to the reporting and disclosure requirements of ERISA, 29 U.S.C. §§ 1021-1031, so that employees would be aware of their benefits and better able to pursue them. The fact that employees may sometimes wish to forego these advantages of ERISA coverage in favor of arguably more generous state statutes does not allow us to escape the clear direction of Congress.

III.

The district court concluded that ERISA's regulation of severance pay preempted state regulation of the matter. The Commissioner urges us to reverse this holding, arguing instead that ERISA and state statutes such as the

North Carolina Wage and Hour Act should coexist and independently monitor severance pay plans. We do not agree and hold that ERISA preempts the state law claims asserted in this case.

When considering preemption of state law, "our task is to ascertain Congress' intent in enacting the federal the federal statute at issue." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983). In ERISA, Congress made its intent known in what has been called "the most sweeping federal preemption statute ever enacted by Congress." *California Hospital Association v. Henning*, 569 F. Supp. 1544, 1546 (C.D. Cal. 1983). 29 U.S.C. § 1144(a) preempts, with certain exceptions not relevant here,[4] "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.

In *Shaw*, 463 U.S. at 96–97, the Supreme Court held that this language must be given broad effect: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The Court had previously noted that "[t]he only relevant state laws, or portions thereof, that survive this preemption provision are those relating to plans that are themselves exempted from ERISA's scope." *Alessi v. Raybestos-Manhatten, Inc.*, 451 U.S. 504, 523 n.20 (1981). "The pre-emption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements. *Metropolitan Life Insurance Co. v. Massachusetts*, ____ U.S. ____, 105 S. Ct. 2380, 2389 (1985).

A broad reading of the phrase "relates to" is consistent with the legislative history and policies behind ERISA.

[4]The exceptions allow continued operation of state insurance, banking, and securities laws, 29 U.S.C. § 1144(b)(2)(A), within limits defined by the statute, 29 U.S.C. § 1144(b)(2)(B), (b)(6), and generally applicable criminal laws, 29 U.S.C. § 1144(b)(4). The Commissioner does not assert any of these exceptions to ERISA's preemption.

Congress rejected a narrower preemption provision, that would have preempted only state laws dealing directly with ERISA plans. *See Shaw*, 463 U.S. at 98–100. Instead, "Congress legislated an ouster of all state laws relating to employee benefit plans." *Dependahl*, 653 F.2d at 1215. This broad preemption furthers a major policy objective of ERISA—*uniformity* in employee benefit laws. Congress realized that various state regulations of employee benefit plans had become a major concern to employers with plants, divisions, or employees scattered in numerous states, and a broad preemption provision was an integral part of ERISA's response to that concern. *See Shaw*, 463 U.S. at 99.

Given the unparalleled breadth of ERISA's preemption provision, we have no trouble concluding that the state actions at issue are preempted. The state law here essentially requires employers to pay wages due upon termination of employment, N.C. Gen. Stat. § 95-25.7. Insofar as this statute is invoked in pursuit of benefits allegedly due under Burlington's severance pay plan, it "relates to" an employee benefit plan covered by ERISA. Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery.[5] As in *Gilbert*, "the state law claims . . .

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[5]"ERISA does not contain a body of contract law to govern the interpretation and enforcement of employee benefit plans. Instead, Congress intended for the courts, borrowing state law where appropriate, and guided by the policies expressed in ERISA and other federal labor laws, to fashion a body of federal common law to govern ERISA suits." *Scott*, 754 F.2d at 1501–02 (citing cases).

Any hope of uniformity in employer obligations would be lost were we to allow various states' common law governing these obligations to coexist with federal common law under ERISA. Under such a scheme, employers would not only be faced with dual requirements within a single state, but with different state requirements wherever they do business. ERISA surely contemplates a different result.

would determine whether any benefits are paid, and directly affect the administration of benefits under the plan." 765 F.2d at 327. ERISA and the policies underlying it require preemption.

The Commissioner attempts to escape this conclusion by invoking ERISA's definition of "state." ERISA, 29 U.S.C. § 1144(c)(2), defines state to include "a state [and] any political subdivisions thereof . . . which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans." The Commissioner asserts that North Carolina does not, in fact, regulate the "terms and conditions" of the plan, and therefore its statute is not "state" law for preemption purposes. Given the explicitly broad nature of ERISA preemption, we are not inclined to limit ERISA's coverage through a restrictive reading of this term. Even under a narrow interpretation, however, laws that, if given effect, would govern the very availability of benefits for particular individuals clearly regulate the "terms and conditions" of the plan. *See Authier v. Ginsberg,* 757 F.2d 796, 799, n.4 (6th Cir. 1985).[6]

IV.

Having concluded that ERISA governs the issues presented in this case, we must now determine whether Burlington properly denied the claims for severance pay presented by the individual appellants. In reviewing de-

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[6]We reject the Commissioner's argument for a Tenth Amendment exemption from ERISA's preemption, *see Garcia v. San Antonio Metropolitan Transit Authority,* ____ U.S. ____, 105 S. Ct. 1005 (1985), or an exception based on the state's police power, effectively rejected in *Gilbert,* 765 F.2d at 327.

We further reject the appellant's reliance on *Livernois v. Warner Lambert Co., Inc.,* 723 F.2d 1148 (4th Cir. 1983). There the court resolved severance pay issues on state law grounds and noted that cases arising under ERISA were not pertinent and presented a different question. 723 F.2d at 1152-3, n.6.

terminations of claim eligibility under ERISA, we employ an "arbitrary and capricious" standard. *Berry v. Ciba-Geigy Corp.*, 761 F.2d 1003 (4th Cir. 1985); *LeFebre v. Westinghouse Electric Corp.*, 747 F.2d 197 (4th Cir. 1984). *See also, Wolf v. National Shopmen Pension Fund*, 728 F.2d 182, 187 (3d Cir. 1984); *Moore v. Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 457 (6th Cir. 1984); *Berg v. Board of Trustees, Local 705 International Brotherhood of Teamsters Health and Welfare Fund*, 725 F.2d 68, 70 (7th Cir. 1984); *Short v. Central States, Southeast and Southwest Areas Pension Fund*, 729 F.2d 567, 571 (8th Cir. 1984). We hold that the denial of severance benefits to the appellants was not arbitrary and capricious in this case.

A.

We see no reason to deviate from this circuit's "arbitrary and capricious" standard of review, despite the appellants' request that we do so. Appellants argue that the arbitrary and capricious standard should apply only where a formal trust fund is involved. Though many cases applying this standard to eligibility disputes do involve trusts, there is no reason to apply a different standard here. Where claim eligibility is involved, it is necessary to ensure that primary responsibility rests with administrators "whose experience is daily and continual, not with judges whose exposure is episodic and occasional," *Berry*, 761 F.2d at 1006. This objective holds true whenever consistent administration of a pension plan or welfare benefit plan covered by ERISA is at issue. Claim eligibility disputes, absent a finding that they have been resolved in an arbitrary and capricious manner, must remain with those who formulate and administer company plans and policies, whether formally trustees or not. *Accord, Jung*, 755 F.2d at 710–12; *Sly v. P. R. Mallory & Co., Inc.*, 712 F.2d 1209, 1211 (7th Cir. 1983). To vary the standard of judicial review for general asset welfare plans would only sow confusion in ERISA, which we decline to do.

Appellants next urge that we apply here the more stringent fiduciary standards normally reserved for review of trustees' management of trust assets. *See Struble v. New Jersey Employee Welfare Trust Fund,* 732 F.2d 325 (3d Cir. 1984). In *Struble,* plaintiffs challenged the trustees' decision to reduce employer payments into an overfunded plan rather than to increase the level of benefits. The court applied strict fiduciary standards because "the gravamen of the . . . complaint is not that the trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries." *Id.* at 333-34. In *Struble,* those affected by the trustees' action included *all* potential beneficiaries of the plan. Here, by contrast, one group among the many potential beneficiaries of a company plan dispute the denial of their claims, and the issue is not, as in *Struble,* whether the trustees "have sacrificed the interests of *the beneficiaries as a class* in favor of some third party's interests." *Id.* at 333 (emphasis added). *Struble* involved in essence a fund management dispute, to which strict standards normally apply, rather than a question of claim eligibility, as here. *See also, Jung,* 755 F.2d at 711 (distinguishing *Struble*).

Finally, appellants argue that special circumstances may justify a less deferential application of the arbitrary and capricious standard than would normally obtain. In *Blau v. Del Monte Corp.,* 748 F.2d 1348, 1353 (9th Cir. 1984), the court intimated that a more stringent review might be warranted "when ERISA's provisions have been flaunted in . . . a wholesale and flagrant manner." The evidence showed that the plan was "actively concealed" from employees, *id.* at 1352, and that the employer had failed to meet any of ERISA's procedural requirements. Accordingly, the court, though still applying the arbitrary and capricious standard, reviewed the actions in light of the "continuing procedural violations." *Id.* at 1354.

We have underscored in this circuit the application of

a single standard of review to questions of claim eligibility. *See Berry*, 761 F.2d at 1006; *LeFebre*, 747 F.2d at 204, *Horn v. Mullins*, 650 F.2d 35, 37 (4th Cir. 1981). We see no reason to vary the standard based on procedural violations indicating bad faith, for such situations can be adequately resolved under the traditional standard. Where procedural violations evidence a "wholesale and flagrant" flouting of ERISA, the actions of administrators will not be insulated from a finding of arbitrariness. We would approach the question, however, within the framework of the single, uniform standard to be applied to all claim eligibility disputes.

B.

Applying this standard to the facts before us, we find nothing arbitrary and capricious in Burlington's denial of severance pay. "Where the language used by the employer in holding out the plan is open to a construction supporting denial of a claim, the court should see whether the choice of that construction is arbitrary and capricious." *Jung*, 755 F.2d at 711. Here, Burlington determined that there was no "job elimination" as required by the plan because appellants had remained continuously employed in the same jobs they held before the transfer of ownership. This construction, though not compelled by the plan's language, is certainly a reasonable one, especially when viewed in light of the goals of the plan.

Burlington presented evidence that the plan was primarily intended for employees who suffered a period of unemployment when they were involuntarily terminated from their jobs. Appellants argue that this purpose is refuted by the fact that the benefits did not end when a former employee found new work; this feature, they allege, shows that the plan was not a form of unemployment compensation but was instead a type of accumulated compensation for past services. This feature of the plan, however, could just as easily be attributed to the admin-

istrative convenience of avoiding the need to monitor former employees' status for up to twelve months. In any case, unemployment compensation was undoubtedly a major purpose of the plan. *See Jung*, 755 F.2d at 713; *Sly*, 712 F.2d at 1211.

Given this purpose, we find that Burlington's interpretation of the plan was reasonable. Though it is true that the appellants stopped working for Burlington and started working for Kayser-Roth, this change in employer could reasonably be said to fall outside the scope of "job elimination." The appellants never missed a day of work due to the transfer, and most continued in their same jobs without interruption. There was no time during which they were forced to go without income due to the sale of the divisions. Employees who were not hired by Kayser-Roth received severance pay in due course. Under these circumstances, the denial of severance pay benefits to the appellants was not arbitrary and capricious but was in fact a perfectly reasonable interpretation of Burlington's severance pay policy which courts may not replace with an interpretation of their own. *LeFebre*, 747 F.2d at 204-05.

Moreover, the facts of this case do not suggest a "wholesale and flagrant" flouting of ERISA procedures that would indeed evidence bad faith and arbitrary behavior on an employer's part. Whatever violations may have occurred do not approach the level of those in *Blau*. There, for example, the plan was actively concealed from the employees; here, a general statement of policy was given to every employee and a detailed description was available upon request. Moreover, the employer in *Blau* never informed employees of its decision to deny severance pay. By contrast, Burlington promptly informed appellants that severance pay was not available under its policy. In this context, we are unable to conclude that procedural violations indicate bad faith so as to render the decisions of Burlington arbitrary and capricious.

V.

We affirm finally the decision of the court below not to award injunctive relief against Burlington. Appellants alleged that Burlington discriminated against them for pursuit of legal remedies by refusing to consider them for reemployment. ERISA, 29 U.S.C. § 1140, prohibits such behavior, and appellants sought injunctive relief against the practice. Though there is evidence that Burlington refused to consider appellants for reemployment for several months, no one was affected by this policy while it was in force. Moreover, a corporate directive was subsequently issued to forbid such behavior, and three plaintiffs were in fact reemployed by Burlington. Given these facts, we find that the court below did not abuse its discretion in denying appellants' request for injunctive relief.

VI.

We have considered the contentions of appellants and find that they were properly resolved by the district court. The judgment of that court is, accordingly,

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Greensboro Division

C-83-274-G

BILL N. SLACK, *et al.*,
Plaintiffs,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants.

MEMORANDUM OPINION

ERWIN, District Judge:

This cause came on for hearing on August 27, 1984 at the United States Courthouse in Greensboro upon motions filed by all parties in the case. Plaintiffs are 202 former employees of defendant Burlington Industries, Inc. (Burlington), Sock and Hosiery Divisions. The case centers on whether plaintiffs are entitled to benefits under a severance pay policy in effect at the time defendant Burlington sold its Sock and Hosiery Divisions to Kayser-Roth Corporation in 1982 as ongoing concerns. After defendant Burlington refused to pay any benefits under the severance policy to its former employees who now work for Kayser-Roth, plaintiffs filed an action in state court alleging five grounds for relief. All five grounds are based on state statutory and common law. The first ground alleges common law breach of contract. The second ground alleges violation of N.C. Gen. Stat. § 95-25.7, which requires employers to pay employees all wages due at the time of termination of employment. The third ground is based on the theory of equitable estoppel. The fourth ground is based on the contract theory

of reliance. The fifth ground alleges violation of N.C. Gen. Stat. § 75-1.1, which prohibits unfair or deceptive trade practices.

Thereafter, defendant Burlington petitioned for removal of the action to federal court, asserting that the severance pay policy is an employee benefit plan subject to the Employment Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* Without prejudging in any fashion the merits of the intervenor complaint, this court allowed the North Carolina Commissioner of Labor to intervene in the federal action.

In federal court, plaintiffs filed a motion for preliminary injunction to enjoin defendant Burlington from refusing to consider any of the plaintiffs for re-employment with Burlington so long as they were plaintiffs in the present action. Plaintiffs were then granted leave to file an amended complaint which added three new defendants, all executives of defendant Burlington, and which alleged three additional grounds for relief. The three grounds for relief are based on federal statutory law. The sixth ground for relief alleges that plaintiffs are entitled to benefits under the severance pay policy pursuant to 29 U.S.C. § 1132(a)(1)(B). The seventh ground alleges that defendant's refusal to consider any of the plaintiffs for re-employment constituted discrimination in violation of 29 U.S.C. § 1140. The eighth ground alleges that the three new defendants breached their fiduciary duty with respect to the severance pay policy as defined in 29 U.S.C. § 1104(a)(1).

Defendant Burlington then filed a motion for summary judgment pursuant to Rule 56, F. R. Civ. P., against plaintiffs and plaintiff-intervenor with supporting brief, affidavits, and depositions. Thereafter, plaintiffs filed a motion for partial summary judgment on the three claims based on ERISA pursuant to Rule 56, F. R. Civ. P., with supporting brief, affidavits, and depositions. Additionally, plaintiff-intervenor filed a motion to dismiss for lack of

federal jurisdiction, alleging that Burlington's severance pay policy is not governed by ERISA.

Plaintiff-Intervenor's Motion to Dismiss

In its motion to dismiss, plaintiff-intervenor contends that defendant Burlington's severance pay policy is not governed by ERISA; therefore, there is no basis for federal jurisdiction. Furthermore, plaintiff-intervenor asserts that defendant Burlington failed to allege any alternate grounds for federal jurisdiction and moves for a remand of this action to the state courts. The issue before the court is whether defendant Burlington's severance pay policy is governed by ERISA. The thrust of plaintiff-intervenor's argument is that defendant's severance pay policy is a payfoll practice policy subject to the North Carolina Wage and Hour Act rather than an employee welfare benefit plan subject to ERISA. In support of its argument, plaintiff-intervenor contends that:

1. Defendant's severance pay policy does not satisfy the required statutory scheme because it is funded from Burlington's general assets and does not have a separate entity from defendant;

2. The Department of Labor has exceeded its authority where it appears to expand the definition of employee welfare benefit plans to include all severance pay arrangements, even where they are not set as jointly administered trust funds; and

3. Defendant has failed to comply with ERISA's formal requirements regarding an employee benefit plan and should be estopped from using ERISA as a shield to avoid liability under the North Carolina Wage and Hour Act.

All of these contentions are without merit. First, both the statute and case law include severance pay arrangements within the definition of employee welfare benefit plans for purpose of ERISA coverage. Title 29 of the United States Code, Section 1002(2)(B), states: "The Secretary

may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which . . . severance pay arrangements . . . shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans." The Secretary has promulgated such a rule which treats a severance pay plan as an employee welfare benefit plan. 29 C.F.R. § 2510.3-1(a)(3) (1983). Additionally, the courts have consistently held that severance pay plans were employee welfare benefit plans under ERISA. *See Sly v. P. R. Mallory & Co., Inc.*, 712 F.2d 1209 (7th Cir. 1983); *Dhayer v. Weirton Steel Division of National Steel Corp.*, 571 F. Supp. 316 (N.D. W.Va. 1983); *Donnelly v. Aetna Life Ins. Co.*, 465 F. Supp. 696, 698 (E.D. Pa. 1979); *Calhoun v. Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979); *Petrella v. NL Industries, Inc.*, 529 F. Supp. 1357 (D. N.J. 1982); *Pinto v. Zenith Radio Corp.*, 480 F. Supp. 361, 362-63 (N.D. Ill. 1979), *aff'd*, 618 F.2d 110 (7th Cir. 1980); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir.), *cert. denied sub nom. Dependahl v. Kalmanovitz*, 454 U.S. 1084 (1981).

Secondly, there is no case law to support the proposition that severance pay arrangements must be funded from trust assets separate from the employer's general assets or that the arrangement must exist as a separate entity. As the court in *Dhayer v. Weirton Steel Division of National Steel Corp., supra*, at 330, noted: "Indeed, the funding requirements of ERISA do not apply to employee welfare benefits plans such as a severance pay benefit, 29 U.S.C. § 1081, and there is no 'fund' or group of assets subject to the prohibited transaction provisions."

Lastly, plaintiff-intervenor's equitable estoppel argument does violence to the purpose of ERISA. The court in *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982), aptly observed:

> [B]ecause the policy of ERISA is to safeguard the well-being and security of working men and

> women and to apprise them of their rights and obligations under any employee benefit plan . . . it would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards.

Therefore, the court finds that defendant Burlington's severance pay policy is governed by ERISA, and the court has jurisdiction of this case. Accordingly, plaintiff-intervenor's motion to dismiss must be denied.

Defendant Burlington's Motion for for Summary Judgment

In its motion for summary judgment, defendant Burlington contends that plaintiffs and plaintiff-intervenor's claims based upon state laws are preempted by federal law and that defendant should prevail as a matter of law on the remaining claims based on ERISA. The court will first address the effect of preemption on the state law claims asserted by plaintiffs and plaintiff-intervenor.

Federal Preemption of State Law Claims Under ERISA

The Employment Retirement Income Security Act of 1974 regulates employee fringe benefit plans. ERISA provides for preemption of state law in 29 U.S.C. § 1144(a) as follows:

> (a) Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not

> exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Although specific kinds of state laws are exempt from preemption under this statute, *see* 29 U.S.C. § 1144(b)(2)(A), the effect of the preemption provision is quite broad. Relying on the legislative history of the statute as well as the statute's plain language, the Supreme Court in *Shaw v. Delta Air Lines, Inc.*, ____ U.S. ____, 51 U.S.L.W. 4968 (June 24, 1983), held that 29 U.S.C. § 1144(a) could not be interpreted to preempt only state laws dealing with specific subject matters covered by ERISA but preempted state laws that "relate to any employee benefit plan" within the meaning of the statute. Thus, it is clear that state laws (including all laws, decisions, rules, regulations, or other state action having the effect of law) are preempted by ERISA if they "relate to" employee benefit plans not exempted by the statute.

In his complaint, plaintiff-intervenor alleges that the defendant Burlington is liable to the individual plaintiffs for severance pay pursuant to the North Carolina Wage and Hour Act, N.C. Gen. Stat. § 95-25.1 *et seq.* Wages are defined by the Act as specifically including severance pay. N.C. Gen. Stat. § 95-25.2(16). The Act also allows either employees or the Commissioner of Labor to bring a civil action to recover unpaid wages and provides for exemplary damages and injunctive relief.

The court has held that Burlington's severance pay plan is an employee benefit plan subject to ERISA. Inasmuch as the North Carolina Wage and Hour Act defines severance pay as wages, the state statute "relates to" the severance pay plan of Burlington. Accordingly, plaintiff-intervenor's claims under the Act are preempted by ERISA. Therefore, the court must grant defendant's motion for summary judgment as to the claims asserted by the plaintiff-intervenor.

Plaintiffs' second claim for relief is also brought pursuant

to the North Carolina Wage and Hour Act. For the reasons stated above, the court must grant defendant's motion for summary judgment with respect to plaintiffs' second claim for relief.

In their first, third, and fourth claims for relief, plaintiffs allege they are entitled to recover severance pay based on common law contract and estoppel theories. These common law claims "relate to" defendant Burlington's severance pay plan and are preempted by ERISA under 29 U.S.C. § 1144(a). Therefore, the defendant Burlington's motion for summary judgment as to plaintiffs' first, third, and fourth claims must be granted.

Plaintiffs' fifth claim based on the North Carolina Unfair Competition Act, N.C. Gen. Stat. § 75–1.1 must be dismissed because the provisions of the Act do not apply to employer–employee relationships. *Buie v. Daniel Intern Corp.*, 56 N.C. App. 445, 289 S.E.2d 118 (1982). Therefore, defendant's motion for summary judgment with respect to plaintiffs' fifth claim must be granted.

Claims Based upon ERISA

A careful review of the record indicates that there is no genuine issue of material fact and that defendants are entitled to judgment in their favor as a matter of law on the remaining claims based upon ERISA. The standard of review of a claim decision made by a plan administrator is whether the administrator's decision was arbitrary or capricious. *Horn v. Mullins*, 650 F.2d 35 (4th Cir. 1981). This standard of review is applied whether the "plan" is an employee pension plan or, as here, an employee welfare benefit plan providing for severance pay. *Sly v. P. R. Mallory & Co.*, 712 F.2d 1209, 1211 (7th Cir. 1983). Thus, the court must determine whether there is substantial evidence to support defendants' decision to deny severance pay to plaintiffs.

Plaintiffs contend that the governing document in this

case is the Salaried Employees Handbook. The handbook contains highlights of Burlington's benefit plans. The handbook is distributed to all salaried employees of Burlington and contains a description of the defendant Burlington's severance pay plan. The court finds, however, that the governing document for the administration of the severance pay plan is the Company Policy Manual rather than the Salaried Employees Handbook. The Policy Manual contains a compilation of formal policy statements. Although the salaried employees were not provided with a copy of the policy manual, the employees did have access to it.

The Policy Manual contained a section dealing with severance pay as early as June 1953. The provisions of that section were revised on various occasions during the relevant period. A 1974 revision provided that "job elimination" was a condition of eligibility for severance pay. The language in effect at the time of the sale of the Sock and Hosiery Divisions to Kayser-Roth provided in pertinent part:

> 1. *Eligibility* — Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are involuntarily terminated from the Company. Eligibility requirements are:
>
> a. *Job Elimination* — This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes.

Plaintiffs argue that "job elimination" applies to involuntary terminations of employees when their jobs are eliminated with defendant, irregardless of the availability of employment elsewhere. Defendants, on the other hand, argue that the words, "job elimination" refer to the elimination of jobs as such and that when jobs are preserved as a result of an organizational change, the mere loss of em-

ployment at Burlington does not trigger eligibility for severance pay. The court finds that defendants' interpretation of its plan is rational in view of the plain language of the plan, the purpose of the plan, and defendants' past practices in relation to the severance pay plan.

Burlington established its severance policy for the purpose of providing financial support to employees whose jobs are lost through no willful fault of their own and who might therefore be in need of financial resources during a period of unemployment. It is evident that since the inception of Burlington's present severance policy in 1974, defendants have consistently applied that policy in the context of plant and division sales to bar severance pay to employees who continue in their jobs under new management. The court notes that a payment to Fleet Services employees who were terminated by Burlington but who continued working with new employers was a special cash award rather than severance pay. The court finds that defendants' decision to deny plaintiffs severance pay benefits was supported by substantial evidence on the record and was not arbitrary or capricious.

In their seventh claim for relief, plaintiffs allege that defendants have discriminated against them by refusing to consider plaintiffs for re-employment with Burlington because they filed this lawsuit. Plaintiffs seek injunctive relief. Title 29 of the United States Code, Section 1140, prohibits discrimination against a participant for exercising any right to which he is entitled under ERISA or under the employee benefit plan or for the purpose of interfering with the attainment of any right to which the participant may become entitled under the plan.

The court finds that plaintiffs' seventh claim is moot. Although the deposition of Burlington's director of personnel reveals that defendants adopted a policy after this action was filed of refusing to consider the plaintiffs for for re-employment, this policy was subsequently revoked. Quintana's Affidavit. There is no evidence that at the

present time, plaintiffs who seek re-employment with Burlington are being denied consideration. Therefore, the court finds that injunctive relief is inappropriate.

Plaintiffs' eighth and final claim for relief alleges that Burlington and three employees of Burlington who hold management responsibility for the personnel policies of Burlington breached fiduciary duties owed to plaintiffs under ERISA. This claim is without merit. As the court noted previously, defendants' decision to deny plaintiffs severance pay is supported by substantial evidence on the record and was not arbitrary or capricious. Therefore, the court finds that defendants discharged their duties in administering the severance pay plan with diligence and prudence in accordance with the documents governing the plan. 29 U.S.C. § 1104(a)(1).

For the foregoing reasons, IT IS ORDERED, ADJUDGED, AND DECREED that defendants' motion for summary judgment is hereby **DENIED**; and that plaintiff intervenor's motion to dismiss is hereby **DENIED**.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for preliminary injunction is hereby **DENIED**. A judgment will be entered contemporaneously with this Memorandum Opinion dismissing this action with prejudice as to the defendants.

/s/ Richard Erwin
United States District Judge

October 17, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
Greensboro Division

C-83-274-G

BILL N. SLACK, *et al.*,
Plaintiffs,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants.

JUDGMENT

For the reasons stated in a Memorandum Opinion filed contemporaneously herewith, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants' motion for summary judgment be granted; that plaintiffs' motion for partial summary judgment be denied; and that plaintiff-intervenor's motion to dismiss be denied.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiffs' motion for preliminary injunction be denied. This action is dismissed with prejudice, and all parties are to bear their own costs.

/s/ Richard Erwin
United States District Judge

October 17, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1985 Term

84-2241(L)
84-2257

BILL N. SLACK, *et al.*,
Plaintiffs-Appellants,

v.

BURLINGTON INDUSTRIES, INC., *et al.*,
Defendants-Appellees.

JOHN C. BROOKS,
Commissioner of Labor of the
State of North Carolina,
Plaintiff-Intervenor-Appellant,

v.

BURLINGTON INDUSTRIES, INC.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

NOTICE is hereby given pursuant to Rule 10 of the Rules of the Supreme Court of the United States that John C. Brooks, Commissioner of Labor of the State of North Carolina, as plaintiff-intervenor-appellant, hereby appeals to the Supreme Court of the United States under 28 U.S.C. § 1254(2) from the judgment of this Court entered September 3, 1985.

This the 15th day of October, 1985.

LACY H. THORNBURG
North Carolina Attorney General

/s/ TIARE B. SMILEY
Assistant Attorney General
N.C. Department of Justice
Post Office Box 629
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Attorneys for
Plaintiff-Intervenor-Appellant

APPENDIX E

Relevant Statutes and Regulations

Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.*

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power. The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a larger volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated

retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits: and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

* * *

§ 1002. Definitions

For purposes of this title:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purposes of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

(2) (A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its

express terms or as a result of surrounding circumstances such plan, fund, or program —

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

(B) The Secretary may by regulation prescribe rules consistent with the standards and purposes of this chapter providing one or more exempt categories under which —

(i) severance pay arrangements, and

(ii) supplemental retirement income payments, under which the pension benefits of retirees or their beneficiaries are supplemented to take into account some portion or all of the increases in the cost of living (as determined by the Secretary of Labor) since retirement, shall, for purposes of this subchapter, be treated as welfare plans rather than pension plans. In the case of any arrangement or payment a principal effect of which is the evasion of the standards or purposes of this chapter applicable to pension plans, such arrangement or payment shall be treated as a pension plan.

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an

employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

(6) The term "employee" means any individual employed by an employer.

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

(8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may be come entitled to a benefit thereunder.

(9) The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization.

(1) The term "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone. The term "United States" when used in the geographic sense means the States and the Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act (sections 1331 to 1343 of Title 43).

* * *

(14) The term "party in interest" means, as to an employee benefit plan —

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of —

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of Title 26 is permitted to make payments under section 1403 of this title shall be treated as a party in interest with respect to such trust.

* * *

(16) (A) The term "administrator" means —

(i) person specifically so designated by the terms of the instrument under which the plan is operated;

(ii) if an administrator is not so designated, the plan sponsor; or

(iii) in the case of a plan for which an administrator is not designated and a plan sponsor cannot be identified, such other person as the Secretary may be regulation prescribe.

(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained —

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

* * *

§ 1022. Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 104(b) [29 USCS § 1024(b)]. The summary plan description shall include the information

described in subsection (b), shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 104(b)(1) [29 USCS § 1024(b)(1)].

(2) A plan description (containing the information required by subsection (b)) of any employee benefit plan shall be prepared on forms prescribed by the Secretary, and shall be filed with the Secretary as required by section 104(a)(1) [29 USCS § 1024(a)(1)]. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 104(a)(1)(D) [29 USCS § 1024(a)(1)(D)].

(b) The plan description and the summary plan description shall contain the following information: The name and type of administration of the plan; the name and address of the person designated as agent for the service of legal process, if such person is not the administrator; the name and address of the administrator; names, titles and addresses of any trustee or trustees (if they are persons different from the administrator); a description of the relevant provisions of any applicable collective bargaining agreement; the plan's requirements respecting eligibility for participation and benefits; a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits; the source of financing of the plan and the identity of any organization through which benefits are provided; the date of the end of the plan year and whether the records of the plan are kept on a calendar, policy, or fiscal year basis; the

procedures to be followed in presenting claims for benefits under the plan and the remedies available under the plan for the redress of claims which are denied in whole or in part (including procedures required under section 503 of this Act [29 USCS § 1133]).

§ 1023. Annual reports

(a) Publication and Filing. (1)(A) An annual report shall be published with respect to every employee benefit plan to which this part applies. Such report shall be filed with the Secretary in accordance with section 104(a) [29 USCS § 1024(a)], and shall be made available and furnished to participants in accordance with section 104(b) [29 USCS § 1024(b)].

(B) The annual report shall include the information described in subsections (b) and (c) and where applicable subsections (d) and (e) and shall also include—

(i) a financial statement and opinion, as required by paragraph (3) of this subsection, and

(ii) an actuarial statement and opinion, as required by paragraph (4) of this subsection.

* * *

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary. (1) The administrator of any employee benefit plan subject to this part shall file with the Secretary —

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description with 120 days after such plan becomes subject to this part and an updated plan description, not more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 102(a)(2) [29 USCS § 1022(a)(2)] within 60 days after such modification or change is adopted or occurs, as the case may be.

* * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan. Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 102(a)(1) [29 USCS § 1022(a)(1)] —

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

* * *

Participating and Vesting

§ 1031. Coverage

This part [29 USCS §§ 1051 et seq.] shall apply to any employee benefit plan described in section 4(a) [29 USCS § 1003(a)] (and not exempted under section 4(b) [29 USCS § 1003(b)]) other than —

(1) an employee welfare benefit plan;

* * *

Funding

§ 1081. Coverage

(a) This part [29 USCS §§ 1081 et seq.] shall apply to any employee pension benefit plan described in section 4(a) [29 USCS § 1003(a)], (and not exempted under section 4(b) [29 USCS § 1003(b)]), other than —

(1) an employee welfare benefit plan;

* * *

§ 1082. Minimum funding standards

(a) Avoidance of accumulated funding deficiency. (1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 305 [29 USCS § 1085]) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

* * *

§ 1102. Establishment of plan

(a) Named fiduciaries. (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this title, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

(b) Requisite features of plan. Every employee benefit plan shall —

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this title,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 405(c)(1) [29 USCS § 1105(c)(1)]),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

* * *

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest. Except as provided in section 4087 [29 USCS § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(A) sale or exchange, or leasing, if any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to , or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 USCS § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 USCS § 1107(a)].

(b) Transactions between plan and fiduciary. A fiduciary with respect to a plan shall not —

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any

transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest. A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

§ 1132. Civil enforcement

(a) Persons enpowered to bring a civil action. A civil action may be brought —

(1) by a participant or beneficiary —

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USCS § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other

appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * *

(d) Status of employee benefit plan as entity. (1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e) Jurisdiction. (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place,

or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

* * *

§ 1133. Claims procedure

In accordance with regulations of the Secretary, every employee benefit plan shall —

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

* * *

§ 1144. Other laws

(a) Supersedure; Effective Date. Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

* * *

Definitions

(c) For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.

29 C.F.R.

SUBCHAPTER B — DEFINITIONS AND COVERAGE UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

§ 2510.3-1 Employee welfare benefit plan

(a) *General.* (1) The purpose of this section is to clarify the definition of the terms "employee welfare benefit plan" and "welfare plan" for purposes of Title I of the Act and this chapter by identifying certain practices which do not constitute employee welfare benefit plans for those purposes. In addition, the practices listed in this section do not constitute employee pension benefit plans within the meaning of section 3(2) of the Act, and, therefore, do not constitute employee benefit plans within the meaning of section 3(3). Since under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to Title I of the Act, the practices listed in this section are not subject to Title I.

(2) The terms "employee welfare benefit plan" and "welfare plan" are defined in section 3(1) of the Act to include plans providing "(i) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, dis-

ability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (ii) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions)." Under this definition, only plans which provide benefits described in section 3(1)(A) of the Act or in section 302(c) of the Labor-Management Relations Act, 1947 (hereinafter "the LMRA") (other than pensions on retirement or death) constitute welfare plans. For example, a system of payroll deductions by an employer for deposit in savings accounts owned by its employees is not an employee welfare benefit plan within the meaning of section 3(1) of the Act because it does not provide benefits described in section 3(1)(A) of the Act or section 302(c) of the LMRA. (In addition, if each employee has the right to withdraw the balance in his or her account at any time, such a payroll savings plan does not meet the requirements for a pension plan set forth in section 3(2) of the Act and, therefore, is not an employee benefit plan within the meaning of section 3(3) of the Act).

(3) Section 302(c) of the LMRA lists exceptions to the restrictions contained in subsections (a) and (b) of that section on payments and loans made by an employer to individuals and groups representing employees of the employer. Of these exceptions, only those contained in paragraphs (5), (6), (7) and (8) describe benefits provided through employee benefit plans. Moreover, only paragraph (6) describes benefits not described in section 3(1)(A) of the Act. The benefits described in section 302(c)(6) of the LMRA but not in section 3(1)(A) of the Act are "***holiday, severance or similar benefits". Thus, the effect of section 3(1)(B) of the Act is to include within the definition of "welfare plan" those plans which provide holiday and severance benefits, and benefits which are similar (for example, benefits which are in substance severance benefits, although not so characterized).

(4) Some of the practices listed in this section as excluded from the definition of "welfare plan" or mentioned as examples of general categories of excluded practices are inserted in response to questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act. Therefore, this section should not be read as implicitly indicating the Department's views on the possible scope of section 3(1).

(b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include —

(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as —

(i) Overtime pay,

(ii) Shift premiums,

(iii) Holiday premiums,

(iv) Weekend premiums;

(2) Payment of an employee's normal compensation, out of the employer's general assets, on account of periods of time during which the employee is physically or mentally unable to perform his or her duties, or is otherwise absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment); and

(3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric

treatment) performs no duties; for example —

(i) Payment of compensation while an employee is on vacation or absent on a holiday, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons.

(ii) Payment of compensation to an employee who is absent while on active military duty,

(iii) Payment of compensation while an employee is absent for the purposes of serving as a juror or testifying in official proceedings,

(iv) Payment of compensation on account of periods of time during which an employee performs little or no productive work while engaged in training (whether or not subsidized in whole or in part by Federal, State or local government funds), and

(v) Payment of compensation to an employee who is relieved of duties while on sabbatical leave or while pursuing further education.

* * *

§ 2510.3-2 Employee pension benefit plan

(a) *General.* This section clarifies the limits of the defined terms "employee pension benefit plan" and "pension plan" for purposes of Title I of the Act and this chapter by identifying certain specific plans, funds and programs which do not constitute employee pension benefit plans for those purposes. To the extent that these plans, funds and programs constitute employee welfare benefit plans within the meaning of section 3(1) of the Act and § 2510.3-1 of this part, they will be covered under Title I; however, they will not be subject to parts 2 and 3 of Title I of the Act.

(b) *Severance pay plans.* (1) For purposes of Title I of the Act and this chapter, an arrangement shall not be

deemed to constitute an employee pension benefit plan or pension plan solely by reason of the payment of severance benefits on account of the termination of an employee's service, provided that:

(i) Such payments are not contingent, directly or indirectly, upon the employee's retiring;

(ii) The total amount of such payments does not exceed the equivalent of twice the employee's annual compensation during the year immediately preceding the termination of his service; and

(iii) All such payments to any employee are completed,

(A) In the case of an employee whose service is terminated in connection with a limited program of terminations, within the later of 24 months after the termination of the employee's service, or 24 months after the employee reaches normal retirement age; and

(B) In the case of all other employees, within 24 months after the termination of the employee's service.

SELECTED PROVISIONS OF ARTICLE 2A OF CHAPTER 95, NORTH CAROLINA GENERAL STATUTES

§ 95-25.2. Definitions.

In this Article, unless the context otherwise requires:

(16) "Wage" paid to an employee means compensation for labor or services rendered by an employee whether determined on a time, task, piece, job, day, commission, or other basis of calculation, and the reasonable cost as determined by the Commissioner of furnishing employees with board, lodging, or other facilities. For the purposes of G.S. 95-25.6 through G.S. 95-25-12, "wage" includes sick pay, vacation pay, severance pay, commissions, bonuses, and other amounts promised when the employer has a policy or a practice of making such payments.

§ 95-25.6. Wage payment.

Every employer shall pay every employee all wages and tips accruing to the employee on the regular payday. Pay periods may be daily, weekly, bi-weekly, semi-monthly, or monthly. Wages based upon bonuses, commissions, or other forms of calculation may be paid as infrequently as annually if prescribed in advance. (1975, c. 413, s. 3; 1977, c. 826, s. 3; 1979, c. 839, s. 1.)

§ 95-25.7. Payment to separated employees.

Employees whose employment is discontinued for any reason shall be paid all wages due on or before the next regular payday. Wages based on bonuses, commissions or other forms of calculation shall be paid on the first regular payday after the amount becomes calculable when a separation occurs. Such wages may not be forfeited unless the employee has been notified in accordance with G.S. 95-25.13 of the employer's policy or practice which results in forfeiture. Employees not so notified are not subject to such loss or forfeiture. (1975, c. 413, s. 4; 1979, c. 839, s. 1; 1981, c. 663, s. 1.)

§ 95-25.12. Vacation pay.

No employer is required to provide vacation for employees. However, if an employer provides vacation for employees, the employer shall give all vacation time off or payment in lieu of time off in accordance with the company policy or practice. Employees shall be notified in accordance with G.S. 95-25.13 of any policy or practice which requires or results in loss or forfeiture of vacation time or pay. Employees not so notified are not subject to such loss or forfeiture. (1979, c. 839, s. 1; 1981, c. 663, s. 6.)

§ 95-25.22. Recovery of unpaid wages.

(a) Any employer who violates the provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), or G.S. 95-25.6 through 95-25.12 (Wage Payment) shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, their unpaid overtime compensation, or their unpaid amounts due under G.S. 95-25.6 through 95-25.12, as the case may be.

In its discretion, the court may award exemplary damages in an amount not in excess of the amount found to be due as provided above.

(b) Action to recover such liability may be maintained in the General Court of Justice by any one or more employees.

(c) Action to recover such liability may also be maintained in the General Court of Justice by the Commissioner at the request of the employees affected. Any sums thus recovered by the Commissioner on behalf of an employee shall be held in a special deposit account and shall be paid directly to the employee or employees affected.

(d) The court, in any action brought under this section may, in addition to any judgment awarded plaintiff, order costs and fees of the action and reasonable attorneys' fees to be paid by the defendant.

The court may order costs and fees of the action and reasonable attorneys' fees to be paid by the plaintiff if the court determines that the action was frivolous.

(e) The Commissioner is authorized to determine and supervise the payment of the amounts due under this section, and the agreement to accept such amounts by the employee shall constitute a waiver of the employee's right to bring an action under subsection (b) of this section.

(f) Actions under this section must be brought within two years pursuant to G.S. 1-53.

(g) Prior to initiating any action under this section, the Commissioner shall exhaust all administrative remedies, including giving the employer the opportunity to be heard on the matters at issue and giving the employer notice of the pending action. (1959, c. 475; 1975, c. 413, s. 11; 1979, c. 839, s. 1.)

§ 95-25.15. Investigations and inspection of records; notice of law.

(a) The Commissioner or his designated representative shall have the power and authority to enter any place of employment and gather such facts as are essential to determine whether or not the employer is covered by any provision of this Article.

With respect to any provision of this Article under which the employer is covered, the Commissioner or his designated representative may inspect such places and such records, make transcriptions of any and all such records, question employees and investigate such facts, conditions, practices, or matters as are necessary to determine whether the employer has violated said provision of this Article.

With respect to the provisions of G.S. 95-25.6 through 95-25.12 (Wage Payment) as those provisions apply to persons covered by the Fair Labor Standards Act, the Commis-

sioner or his designated representative shall have no authority under this subsection unless the Commissioner or his designated representative has received a complaint from an employee of the covered establishment, and then shall investigate that specific complaint only.

(b) Except as otherwise provided in this Article, every employer subject to any provision of this Article shall make, keep, and preserve such records of the persons employed by the employer and of the wages, hours, and other conditions and practices of employment which are essential to the enforcement of this Article and are prescribed by regulation of the Commissioner, except that the Commissioner shall have no authority to prescribe records for the State of North Carolina, a city, town, county or other municipality or agency or instrumentality of government.

(c) A poster summarizing the major provisions of this Artile shall be displayed in every establishment subject to Article. (1937, c. 317, ss. 5, 19; 1959, c. 475; 1971, c. 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 413, ss. 7, 9; ;1979, c. 839, s. 1.)

§ 95-25.16 Enforcement.

(a) The Commissioner shall enforce and administer the provisions of this Article, and the Commissioner or his authorized representative is empowered to hold hearings and to institute criminal and civil proceedings hereunder.

(b) The Commissioner or his authorized representative shall have power to administer oaths and examine witnesses, issue subpoenas, compel the attendance of witnesses and the production of papers, books, accounts, records, payrolls, documents, and take depositions and affidavits in any proceeding hereunder. (1937, c. 317, s. 409, s. 7; 1231, s. 2; 1973, c. 649, s. 4; 1975, c. 473, s. 9; c. 475; 1979, c. 839, s. 1.)